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# Letter Ruling 10-2: Application of the Container Exemption

June 15, 2010

You have requested a letter ruling on behalf of your client, \*\*\*\*\* (Taxpayer), regarding the Massachusetts sales tax treatment of the business transactions described below.

## I. FACTS

Taxpayer is a wholesale Company located in \*\*\*\*\* whose core business is to provide its customers carbon dioxide (“CO2”) both in liquid and gaseous form for use in beverage carbonation systems, commonly known as soda fountains. Taxpayer’s customers include restaurants, convenience stores, movie theaters, theme parks and sports venues.

Taxpayer sells liquid CO2 and gas CO2 to its customers.<sup>[1]</sup> Taxpayer delivers liquid CO2 to customers that is stored in a stainless steel cryogenic tank (“Bulk CO2 Tank”) installed at the customer’s premises. Gas CO2 is delivered to customers in a portable cast iron steel container (“High Pressure Cylinder”). The customer connects the Bulk CO2 Tank or the High Pressure Cylinder to its beverage carbonation machine (a soda fountain) where the liquid CO2 or gas CO2 is mixed with water and soda syrup (obtained by the customer from a third party vendor) to produce a fountain soda.

Taxpayer’s customers sell fountain sodas to their patrons, each of whom pays sales tax, as appropriate, on his or her purchase of the fountain soda. When the liquid CO2 in a Bulk CO2 Tank or gas CO2 in a High Pressure Cylinder runs out, Taxpayer refills it and continues to do so until the relationship terminates. Upon termination, the customer is obligated to return the Bulk CO2 Tank or High Pressure Cylinder to Taxpayer.

Taxpayer provides its customers with a variety of purchasing plans. You have provided sample contracts for each type of purchase plan along with a sample invoice for each plan. The “Bulk CO2 Budget Plan Agreement” allows Taxpayer’s customers to rent a Bulk CO2 Tank together with an annual allotment of liquid CO2 at a low flat monthly rate. The customer’s invoice under this plan details only the flat monthly rate, rather than separately stating the charges for the Bulk CO2 Tank rental and liquid CO2 sale. Under a second plan, the “Bulk CO2 Equipment Lease and Product Purchase Agreement”, the invoice to customers separately states the charges for Bulk CO2 Tank rental and liquid CO2 sale. Under a third arrangement, some of Taxpayer’s customers own their own Bulk CO2 tank. In those cases, Taxpayer’s only role is to sell liquid CO2 to the customer.

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In addition to the charges above, Taxpayer may charge its customer certain fees, charges and surcharges, as described below.

A. Delivery Fee

Taxpayer incurs costs each time its tanker trucks (outfitted specifically to transport large amounts of carbon dioxide safely and pursuant to Department of Transportation regulations) travel to the customer's location to fill the empty tanks with liquid carbon dioxide. These costs are passed along to the customer in the form of a delivery fee.

B. Energy/Fuel Surcharge

In response to the rising costs of diesel fuel, Taxpayer instituted the energy/fuel surcharge. As the cost of diesel fuel increases, so does the energy/fuel surcharge.

C. Hazardous Materials Fee

The hazardous materials fee accounts for costs incurred to comply with federal, state and local regulations applicable to Taxpayer's operations, including, but not limited to, the cost of required permits.

D. Inspection and/or Permit Fee

Taxpayer pays a third party to inspect its equipment, similar to a fire extinguisher inspection. Those costs are passed on to the customer in the form of an inspection and / or permit fee.

E. Property tax bill

Property taxes are typically billed once annually by separate invoice. There are several Massachusetts locations listed on the sample invoice you provided.

II. Issues

1. Is Taxpayer's sale of liquid or gas CO2 to its customers subject to sales tax?
2. Is Taxpayer's rental of the Bulk CO2 Tanks and High Pressure Cylinders to its customers subject to sales tax? Does the result change when the rental charge is separately stated?
3. Are the fees, charges and surcharges charged in connection with the rental of Bulk CO2 Tanks and High Pressure Cylinders and the sale of liquid and gas CO2 subject to sales tax?

III. RULINGS

1. The sale of liquid or gas CO2 to Taxpayer's customers is exempt from tax under G.L. c. 64H, § 6(r) as a sale of tangible personal property that becomes an ingredient or component part of tangible personal property to be sold.
2. Charges for the rental of the Bulk CO2 Tanks and High Pressure Cylinders are exempt from sales tax under G.L. c. 64H, § 6(q)(2), whether or not separately stated.
3. Since neither the sales of the CO2 nor the rentals of the cylinders are subject to sales tax, the fees, charges and surcharges charged in connection with these sales are also not subject to sales tax.

IV. Discussion

Massachusetts imposes a 6.25 percent sales tax on all sales, at retail in Massachusetts, of tangible personal property by any vendor unless exempt under a specific provision of law. G.L. c. 64H, § 2. A “sale” includes (i) any transfer of title or possession, or both, exchange, barter, lease, rental, conditional or otherwise of tangible personal property for a consideration in any manner or by any means whatsoever. A “sale at retail” is defined as a “sale of services or tangible personal property or both for any purpose other than resale in the regular course of business.” G.L. c. 64H, § 1. Under the latter definition, a sale for the “purpose” of “resale in the regular course of business” qualifies as an exemption from sales and use taxes. See *Raytheon Company vs. Commissioner of Revenue*, 455 Mass. 334; 916 N.E. 2d 372 (2009).

The exemptions to the sales tax are found in G.L. c. 64H, § 6. Section 6 (q) (“the container exemption”) of chapter 64H exempts, in pertinent part, the following:

“(1) sales of both returnable and nonreturnable containers when sold without the contents to persons who place the contents in the container and sell the contents together with the container;

(2) containers when sold with the contents if the sale price of the contents is not required to be included in the measure of the taxes imposed by [chapter 64H];

(3) returnable containers when sold with the contents or resold for refilling. As used in this paragraph the term ‘returnable containers’ means containers of a kind customarily returned by the buyer of the contents for reuse. All other containers are ‘nonreturnable’ containers.”

A second provision, G.L. c. 64H, § 6(r), exempts, in relevant part, “[s]ales of materials, tools and fuel, or any substitute therefor, which become an ingredient and component part of tangible personal property to be sold, or which are consumed and used directly and exclusively ... in the actual manufacture of tangible personal property to be sold.”

Taxpayer’s sales of CO2 to customers

The activities of Taxpayer’s customers involve mixing CO2 with water and syrup to produce a fountain soda, which is then sold. Accordingly, we conclude that Taxpayer’s sales of CO2 to its customers are exempt under G.L. c. 64H, § 6(r), as tangible personal property that becomes an ingredient and component part of tangible personal property to be sold. In order to claim this exemption, the purchaser must present a properly executed Exempt Use Certificate to its vendor of the time of purchase.

Charges for the “rental” of tanks and cylinders

In general, separately stated charges for the sale or rental of taxable tangible personal property are subject to tax, unless such charges are exempt under a particular provision of law. See, generally G.L. c. 64H, §§ 1, 2; DOR Directives 06-3; 00-3; Letter Rulings 82-56; 81-26.

The Commissioner has issued two letter rulings specifically addressing the sales tax treatment of charges for the rental of gas cylinders. See Letter Rulings 79-30 (*Rentals of Reusable Containers*); 95-9 (*Returnable Gas Containers*). Both rulings concluded that such charges are subject to sales tax, without further analysis concerning whether the contents were subject to tax or the applicability of the exemption in G.L. c. 64H, § 6(q)(2).

In Letter Ruling 79-30, a taxpayer in the business of supplying industrial gases provided the gases to customers in cylinders it owned. It charged customers for the gas purchased and for cylinders in

the customer's possession at the end of the month. The ruling focused on the exemption in G.L. c. 64H, § 6(q)(3) for containers sold with the contents; there was no discussion of whether the gas itself was taxable or exempt. Since the cylinder rental was billed separately and was based on the number of cylinders on hand at the end of the month, the ruling concluded that those containers did not qualify as being "sold with the contents" within the meaning of G.L. c. 64H, § 6(q)(3). Accordingly, the Commissioner ruled that the taxpayer was required to collect sales tax on those transactions.

Letter Ruling 95-9 was issued to rescind advice given to a taxpayer in a 1976 letter that concluded that "the rentals of returnable containers in connection with the retail sale of the contents are exempt from Massachusetts sales tax, as are the rentals of containers which are rented with the contents when the sale of the contents is exempt." The Commissioner ruled that the advice was in error as applied to the facts of that case. The Commissioner then ruled that because the cylinders at issue for which a separate rental charge was billed at the end of a month were not containers "sold with the contents" within the meaning of G.L. c. 64H, § 6(q)(3), the rental charges for the cylinders were not exempt.

Neither of the Commissioner's letter rulings addressed whether charges for the rental of gas cylinders or tanks might be exempt under any other provision of law. In particular, the prior rulings did not consider whether the rental charges were for cylinders "sold with contents that were not required to be included in the measure of the taxes imposed by chapter 64H" under G.L. c. 64H, § 6(q)(2). Here, the facts present this issue because we have concluded that sales of the gases are exempt under G.L. c. 64H, § 6(r). Accordingly, they are not required to be included in the measure of the taxes imposed by chapter 64H. If the cylinders at issue are "sold with the contents," the sale or rental of such cylinders is exempt under G.L. c. 64H, § 6(q)(2).

Based on sample contracts you have provided and the specific facts surrounding your transactions with customers, we conclude that the cylinders at issue are sold with contents not subject to sales tax for purposes of G.L. c. 64H, § 6(q)(2). In support of this conclusion, we first note that under both the Taxpayer's "Bulk CO2 Budget Plan Agreement" and the "Bulk CO2 Equipment Lease/Product Purchase Agreement," customers agree to lease the equipment as well as to purchase their entire requirements of liquid CO2 from Taxpayer. Second, Taxpayer's customers must warrant that they are not obligated under the terms of any other contract to lease bulk CO2 cylinders or purchase liquid CO2 for their locations subject to this agreement. Third, title to the tanks remains in the name of Taxpayer at all times. When the relationship terminates, the customer must return the equipment to Taxpayer. If a customer defaults on any terms of the Agreement, the customer must pay repossession charges for the equipment.

Delivery fees and other surcharges

Because we determine that neither Taxpayer's sale of CO2 nor the charges for the rental of its containers is subject to sales tax, we need not determine if any of the related charges described above are included in the "sales price" subject to sales tax under G.L. c. 64H, § 1. Had the sales of the gases or the rentals been taxable, many of these related charges would have been exempt on other grounds, discussion of which is unnecessary given the prior conclusions of this ruling.

V. CONCLUSION

For the reasons stated, we conclude that the tanks and cylinders are "sold with the contents" for purposes of G.L. c. 64H, § 6(q)(2). Accordingly, monthly charges for the rental of tanks and cylinders, whether or not separately stated on the bill to the customer, are exempt from sales tax.

We emphasize the limitations of our interpretation of the scope of the exemption afforded by G.L. c. 64H, § 6(q)(2). If the sale or rental of the tanks were made by a vendor in a transaction separate from the sale of exempt property, or if the sale of the tanks and cylinders were made by a vendor different from the vendor selling the exempt property, our conclusion would be different.

Very truly yours,

/s/Navjeet K. Bal

Navjeet K. Bal  
Commissioner of Revenue

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[\[1\]](#) In some cases, the gas delivered to Taxpayer’s customers is a blend of CO2 and nitrogen, or pure nitrogen. This gas is used to carbonate and propel beer through a tap system. Like a soda, Taxpayer’s customer sells a beer to its patron, each of whom pays sales tax, as appropriate, on his or her purchase of the beer.